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Cocoa Suchi Sdn Bhd v Pinebrook Holding Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–1739 OF 2011
RAMLY ALI, CLEMENT SKINNER AND ABDUL AZIZ ABDUL RAHIM JJCA
23 NOVEMBER 2015

C

Contract — Claims — Claim for work done — Appellants failed to pay respondent for service rendered and contract fees — Respondent sued for unpaid amount — Appellants counterclaimed for negligence, breach of duty, fraud and conspiracy — Whether respondent employed as contractor or consultant D *— Whether satellite images conclusive evidence that respondent had not done their work — Whether claim for fraud and conspiracy sustainable*

Berkat Bersaudara Sdn Bhd ('BBSB') and Cocoa Suchi Sdn Bhd ('CSSB') (the E appellants in the appeals for the original actions and counterclaims) were owners of oil palm plantation lands located in Sandakan, Sabah. BBSB and CSSB had the same shareholders and directors at the material time. BBSB and CSSB had by oral agreement employed Pinebrook Holding Sdn Bhd ('PHSB') ('the respondent in the appeals for the original actions') to carry out cultivation, F maintenance works, harvest and transport the fruits from the plantation as instructed by the respective managers of BBSB and CSSB. BBSB and CSSB had failed to pay for the service rendered and contract fees to PHSB and subsequently terminated PHSB's contract. Consequently PHSB sued both BBSB and CSSB in two separate actions for the unpaid payments. On the G other hand, BBSB and CSSB had filed counterclaim against CSSB's estate managers namely Sefie @ Seffe bin Abdul Aziz ('the first respondent') and Yong Su Khon ('the second respondent'); and also against PHSB's director, Henry Yong Yun Yim ('the third respondent') for damages, fraud, conspiracy and breach of duty. The trial court had allowed PHSB's claims against both BBSB H and CSSB and dismissed BBSB's and CSSB's counterclaims against PHSB, hence these appeals. BBSB contended that PHSB was appointed not merely as contractor but also as consultant to BBSB and PHSB works were not to the acceptable good estate management standard or conditions. BBSB further contended that PHSB had submitted fraudulent claims for goods and services I which were never provided. On this submission, BBSB relied on satellite images of the lands, its expert witness ('DW2') and also the land surveyor ('DW6').

Held, dismissing the appeals with costs of RM30,000:

(1) On the evidence, PHSB was engaged purely as contractor and not as consultant. There was no an iota of evidence to suggest that prior to the termination of PHSB contract in June 2008, payments were made to PHSB as consultant. All payments were made for work done by PHSB as contractor (see para 20).

(2) With regards to the alleged fraudulent claims for work done, BBSB relied on satellite images over the plantation captured by two different programmes. The learned judicial commissioner ('the JC') had rejected the evidence of satellite images and was entitled to do so. This was because the maker of the images was not called and no explanation was offered on why he or she could not be called. Moreover, DW2, the expert called by BBSB to interpret the satellite images had testified that the images never lied unless it had been modified. Implied in this testimony by DW2 was that the images could be modified. Further, the satellite images were not conclusive of the evidence that PHSB had not done their work (see paras 20–21 & 32).

(3) There was insufficient or no evidence at all to sustain the claim for fraud and conspiracy. BBSB had failed to particularise the particulars of fraud or conspiracy to defraud as required under O 18 r 12(1) of the Rules of the High Court 1980 (now O 18 r 12(1) of the Rules of Court 2012). Thus, the learned JC was right to dismissed the claim under this head on the point of pleadings (see para 33).

[Bahasa Malaysia summary

Berkat Bersaudara Sdn Bhd ('BBSB') dan Cocoa Suchi Sdn Bhd ('CSSB') (perayu-perayu di dalam rayuan-rayuan bagi tindakan asal dan tuntutan balas) adalah pemilik tanah ladang kelapa sawit yang terletak di Sandakan, Sabah. BBSB dan CSSB mempunyai pemegang-pemegang saham dan pengarah-pengarah yang sama pada masa material. BBSB dan CSSB telah melalui perjanjian lisan mendapatkan perkhidmatan Pinebrook Holding Sdn Bhd ('PHSB') ('responden dalam rayuan-rayuan bagi tindakan asal') untuk menjalankan penanaman, kerja-kerja penyelenggaraan, penuaian dan menghantar buah-buahan daripada ladang seperti yang diarahkan oleh pengurus BBSB dan CSSB masing-masing. BBSB dan CSSB telah gagal untuk membayar perkhidmatan yang diberikan dan fi kontrak kepada PHSB dan kemudiannya menamatkan kontrak PHSB. Akhirnya PHSB menyaman kedua-dua BBSB dan CSSB dalam dua tindakan berasingan bagi bayaran yang tidak dibayar. Sebaliknya, dan CSSB telah memfailkan tuntutan balas terhadap pengurus estet CSSB iaitu Sefie @ Seffe bin Abdul Aziz ('responden pertama') dan Yong Su Khon ('responden kedua'); dan juga terhadap pengarah PHSB, Henry Yong Yun Yim ('responden ketiga') bagi ganti rugi, fraud, pengkomplotan dan kemungkiran tugas. Mahkamah perbicaraan telah membenarkan tuntutan-tuntutan PHSB terhadap kedua-dua BBSB dan CSSB dan menolak tuntutan balas BBSB dan CSSB terhadap PHSB, maka

rayuan-rayuan ini. BBSB berhujah bahawa PHSB dilantik bukan sahaja sebagai kontraktor tetapi juga sebagai pakar runding kepada BBSB dan kerja-kerja PHSB bukan kepada standard atau syarat-syarat pengurusan estet baik yang boleh diterima. BBSB selanjutnya berhujah bahawa PHSB telah memasukkan tuntutan-tuntutan fraud bagi barangan dan perkhidmatan yang tidak pernah diberikan. Atas hujahan ini, BBSB bergantung kepada imej satelit tanah tersebut, saksi pakarnya ('DW2') dan juga juruukur tanah ('DW6').

Diputuskan, menolak rayuan-rayuan dengan kos sebanyak RM30,000:

(1) Atas keterangan, PHSB diambil bekerja semata-mata sebagai kontraktor dan bukan pakar runding. Tidak terdapat satu pun keterangan untuk mencadangkan bahawa sebelum penamatan PHSB pada Jun 2008, bayaran-bayaran dibuat kepada PHSB sebagai pakar runding. Kesemua bayaran dibuat untuk kerja yang dilakukan oleh PHSB sebagai kontraktor (lihat perenggan 20).

(2) Berkaitan kepada tuntutan fraud yang didakwa bagi kerja telah dibuat, BBSB bergantung atas imej satelit atas ladang yang ditangkap oleh dua program berbeza. Pesuruhjaya kehakiman ('PK') yang bijaksana telah menolak keterangan imej satelit tersebut dan berhak berbuat sedemikian. Ini adalah kerana pembuat imej tidak dipanggil dan tiada penjelasan ditawarkan mengapa dia tidak dapat dipanggil. Lebih lagi, DW2, pakar yang dipanggil oleh BBSB untuk mentafsir imej satelit tersebut telah memberi keterangan bahawa imej tidak menipu kecuali jika ia diubah suai. Tersirat dalam keterangan oleh DW2 adalah bahawa imej mungkin telah diubah suai. Selanjutnya, imej satelit bukan keterangan konklusif bahawa PHSB tidak membuat kerja mereka (lihat perenggan 20–21 & 32).

(3) Keterangan tidak mencukupi atau langsung tidak ada untuk mengekalkan tuntutan bagi fraud dan pengkomplotan. BBSB telah gagal untuk memperincikan butir-butir fraud atau pengkomplotan untuk menipu seperti yang dikehendaki di bawah A 18 k 12(1) Kaedah-Kaedah Mahkamah Tinggi 1980 (sekarang ini A 18 k 12(1) Kaedah-Kaedah Mahkamah 2012). Oleh itu, PK adalah betul untuk menolak tuntutan di bawah perkara ini semasa pliding (lihat perenggan 33).]

Notes

For cases on claim for work done, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 4158–4161.

Cases referred to

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 CLJ 509, SC (refd)

Mohd Nazari bin Ab Majit v Tan Keo Hock & Anor [1998] MLJU 382; [1999] 1 CLJ 601, HC (refd)
Wong Yew Kwan v Wong Yu Ke & Anor [2009] 2 MLJ 672; [2010] 2 CLJ 702, CA (refd)

Legislation referred to

Evidence Act 1950 s 90A
Rules of Court 2012 O 18 r 12(1)
Rules of the High Court 1980 O 18 r 12(1)

Appeal from: Suit Nos S22–46 of 2010 and S-22–32 of 2008 (High Court, Sandakan)

David Fung (Serena Liew with him) (Serena Liew & Assoc) for the appellant.
Edwin Tsen (Tan Pang Tsen & Co) for the respondent.
Ken Yong (Ken Yong & Co) in counterclaim for the first respondent.
Edwin Tsen (Tan Pang Tsen & Co) for the second and third respondents (Pinebrook).

Abdul Aziz Abdul Rahim JCA:

[1] There are two appeals before us. The first appeal is Appeal No 1739 and the second appeal is Appeal No 1740.

[2] In Appeal No 1739, Cocoa Suchi Sdn Bhd ('CSSB'), the appellant, is appealing against the decision of the learned judicial commissioner ('the JC') given at Sandakan on 9 May 2011 allowing the respondent Pinebrook Holding Sdn Bhd's ('PHSB') claim in the original action and dismissing CSSB's counterclaim against first, second and third respondent in the counterclaim.

[3] In Appeal No 1740, the appellant, Berkat Bersaudara Sdn Bhd ('BBSB') is appealing against the same decision which allowed the respondent's, PHSB, claim in the original action and dismissing BBSB's counterclaim against the first second and third respondent in the counterclaim.

[4] We heard both appeals together and at the end of the day we arrived at unanimous decision to dismiss them both with cost of RM20,000 to the respondents in Appeal No 1739 and RM10,000 to the respondents in Appeal No 1740. We give our reasons below.

[5] Reference to the first, second and third respondents in this judgment will be reference to the first, second and third defendants in the counterclaim action.

[6] For ease of reference, the first respondent was the CSSB's estate manager appointed by CSSB to supervise PHSB works on CCSB land. The second respondent was the CSSB estate auditor on 6 February 2006 and later took over as CSSB estate manager from the first respondent around July 2007. The third respondent was the director and shareholder of MMS International Sdn Bhd which later changed its name to PHSB.

[7] The respondent, PHSB, filed two actions against two different defendants.

[8] The first action is High Court Suit No S22–32 of 2008 against the appellant BBSB claiming the sum of RM312,711.38 as payment for work and services rendered to BBSB for the months of April, May and June 2008.

[9] The second action is Sandakan Sessions Court Summons No 52–337 of 2008 against the appellant, CSSB for the sum of RM83,550.52 as contract fees due and payable to PHSB, the respondent. CSSB however denied owing the sum to PHSB. Instead CSSB counterclaimed against PHSB for the sum of RM3,019,102.22 being total loss of profit between the years 2004 to 2008. Apparently from para 19 of the CSSB amended defence and counterclaim, this sum is the discrepancy between the expected yield and the actual yield of palm oil fruits from the CSSB land for the years 2004–2007; which discrepancy CSSB alleged to have caused by PHSB failure, negligence or omission of the PHSB to exercise due care to upkeep and maintain the palm trees planted on CSSB land. Because the amount of the counterclaim exceeded the jurisdiction of the sessions court, CSSB filed an Originating Motion No S25–01 of 2010 in the High Court to have its counterclaim be transferred to the High Court. This was allowed and the counterclaim was registered as Suit No 22–46 of 2010. In the same suit CSSB also counterclaimed against the first, second and third respondent jointly and severally for damages, for fraud and conspiracy and breach of duty. So, basically Suit No 46 is about the counterclaim by CSSB.

[10] Before the High Court the parties have agreed that Suit No 32 and Suit No 46 be tried together and that the decision in Suit No 32 shall bind Suit No 46. It was further agreed that evidence in Suit No 32 be used in Suit No 46 and the CSSB counterclaim.

[11] The undisputed factual background to the disputes between the parties are as found by the learned JC in his grounds of decision and they are as follows:

(a) Berkat Bersaudara is the registered proprietor of two pieces of land registered under PL 086290388 and under PL 086290379. In this trial, these two pieces of lands hall be referred to respectively as Division 1 or BB1 and Division 2 or BB2. BB1 measures approximately 672.66 acres (272.77 hectares) and is divided into seven blocks of approximately 100

acres each. BB2 measures approximately 2306.01 acres (933.230 hectares) and is divided in 23 blocks of approximately 100 acres each.

(b) sometime in the year 2000, Berkat Bersaudara appointed MMS International ('MMS') to carry out certain works to BB1 and BB2. MMS was an enterprise headed by Yong Su Khon also known as John Yong ('Yong'), the third defendant in the counterclaim and that by a letter dated 19 March 2004 to Berkat Bersaudara, MMS informed that it will continue to carry out the said works through Pinebrook. What is disputed however is the exact nature of the scope works that MMS and Pinebrook have agreed to provide to Berkat Bersaudara. MMS and Pinebrook contended that their scope of works consisted only of cultivation, maintenance, building road and bridges, application of fertilisers, harvesting and transporting of oil palm fruits. On the other hand, Berkat Bersaudara contended that MMS' and Pinebrook's contractual responsibilities extend beyond cultivation, maintenance, building road and bridges, harvesting and transporting of oil palm, and includes, inter alia, mobilising of equipments and labours to carry out works of trees cutting, drying and burning, jungle clearly, building and maintaining roads and bridges to the plantation, terracing, lining, spraying of herbicide, clearing pathways.

(c) Berkat Bersaudara contended that Pinebrook was not only just a contractor but the consultant as well. They further contended that Pinebrook's contractual responsibilities include a host of duties which they referred to as 'the said responsibilities', and Pinebrook was required to carry out 'the said responsibilities' with utmost due care and diligence for the benefit and best interest of the plaintiff through the exercise of good and wise discretions and good estate management practice and/or upon receiving the plaintiff's written instructions. (Please see para 4(a) and (b) of the re-amended statement of defence and counterclaim dated 5 January 2011).

(d) the supervision and verification of MMS' and Pinebrook's duties and job claims respectively was carried out Sefie @ Seffe bin Abdul Azis ('Sefie'), the first defendant in the counterclaim who was employed by Berkat Bersaudara. Sefie was however sacked on 22 June 2007 for dishonesty and in his place was one, Subramaniam A/L KS Easwaran ('Subramaniam'), the second Defendant in the counterclaim who also subsequently sacked. Both Sefie and Subramaniam together with Yong and his son, Henry Yong, the fourth defendant in the counterclaim, are being sued respectively as the first, second, third and fourth defendants in the counterclaim for, inter alia, breach of duties and for fraud/ conspiracy to defraud Berkat Bersaudara.

(e) Berkat Bersaudara alleged that due to the Pinebrook's breach of duty and/or negligence they suffered loss. In the counterclaim against Pinebrook, Berkat Bersaudara also alleged that Pinebrook submitted fraudulent claims on services and goods which Pinebrook did not in fact provide, or barely on/or skimpily provided or provided not to the

standards of acceptable industry standard management practices. (Please see para 8 of the re-amended statement of defence and counterclaim dated 5 January 2011).

(f) later on, Berkat Bersaudara included the first, second, third and fourth defendants in their amended counterclaim by contending, inter alia, that the four defendants conspired together to defraud Berkat Bersaudara. In particular Berkat Bersaudara alleged as follows in respect of Sefie as follows:

(i) Berkat Bersaudara appointed Sefie as Estate Manager to supervise Pinebrook on 'the said responsibilities'. (Please see para 32 of the counterclaim), and that Sefie breached this duty and he was negligent;

(ii) that Sefie also committed fraud and/or conspired together with Pinebrook and the rest of the defendants to defraud Berkat Bersaudara by fraudulently approving claims by Pinebrook; and/or

(iii) that Sefie intentionally and knowingly verified claims by Pinebrook for purchases of goods and services in job claims submitted by Pinebrook without 'actual documentary proof of physical inspection jointly with Pinebrook at the work area before commencement and after completion of works (together with daily worksheet endorsed by both parties) taking into account the bills of quantities and/or acceptable estate management practices'; and

(iv) thereby rendering payments made by Berkat Bersaudara to Pinebrook were made for goods and services which Pinebrook did not in fact provide, or barely on/or skimpily provided or provided not to the standards of acceptable industry standard management practices. (Please see para 39–40 of the re-amended statement of defence and counterclaim dated 5 January 2011).

(v) as a result, Berkat Bersaudara suffered loss and denied liability to pay Pinebrook. In the alternative, Pinebrook's claims are exhausted by Berkat Bersaudara's counterclaim.

[12] The learned JC allowed PHSB's claim and dismissed CSSB's counterclaim. Hence, these two appeals. It is pertinent to note and bear in mind throughout these two appeals that BBSB and CSSB were owners of plantation land to be planted or had been planted with oil palm. BBSB and CSSB have the same shareholders and directors at the material times. BBSB was the registered owner of the plantation at Mile 72, Labuk Road Sandakan and CSSB was the registered owner of the plantation at Mile 68, Labuk Road Sandakan. Both BBSB and CSSB by oral agreement employed or engaged MMS (which later changed its name to PHSB) carry out cultivation, maintenance works, harvest and transport the fruits from the plantation as instructed by the respective managers of BBSB and CSSB.

[13] It is also worthwhile to keep in mind that, as found by the learned JC, the supervision and verification of PHSB works and claims was carried out by Sefie @ Seffe bin Abdul Azis, the first defendant in Suit No 46 (the counterclaim by CSSB). He was employed by BBSB. However he was sacked on 22 June 2007 for being dishonest and was replaced by one Subramaniam a/l KS Aswaran, the second defendant in the counterclaim by CSSB. The first, second, third and fourth defendants in Suit No 46 are being sued, inter alia, for breach of duties and for fraud and conspiracy to defraud BBSB.

[14] BBSB alleged that PHSB had submitted fraudulent claims for goods and services it had provided to BBSB (and to CSSB as well) which were never provided or if provided, the goods or services were not to the standards acceptable in the industry or management practices.

[15] On this issue the learned JC found, on the evidence, that the works and services to be performed by PHSB were agreed beforehand between PHSB and BBSB. After completion, BBSB managers or servants would inspect the works and services rendered and verified and subsequently approved by BBSB estate manager. Thereafter PHSB claims would be sent to BBSB Kuala Lumpur office to be checked by BBSB account department. The learned JC also found that normally BBSB estate manager would enclosed works report and photographs to show that the works were carried out and done. Then only payment will be made. This arrangement went on very well from year 2000 when PHSB (at that time known as MMS) commenced works on BBSB and CSSB plantations until 2008.

[16] The learned JC found that in 2008, DW4 (Madam Wang Shu Erh) took charge of the management of BBSH. She decided to hold back payment of PHSB claim for months of April, May and June 2008 because she wanted to check the claims. It appears that after checking, she formed the view that PHSB works were not to the acceptable good estate management standard or conditions. As a result of which she alleged that BBSB had suffered losses between the actual yield and the expected yield of oil palm harvests. That seems to be the basis for the claim by BBSB and CSSB that PHSB was negligent and in breach of duty of care and its claims were fraudulent in the counterclaim.

[17] Regarding the scope of works and services and the standard of 'acceptable good estate management conditions' in relation to those works and services which the BBSB and CSSB purportedly expected from PHSB, the learned judge found that BBSB and CSSB 'had sought to impose additional terms to the contract or arrangement between them and Pinebrook'. In this respect it is noted that there is no formal contract signed by the parties on the appointment of PHSB for the works and services to be rendered. The exact nature and scope of works and services to be carried by MMS (and later PHSB)

were never spelt out clearly. Learned counsel of BBSB in her written submission dated 18 February 2013 submitted that '[T]here is some confusion and dispute in the trial over what were Pinebrook's scope of works and whether it was only a contractor or a consultant as well. This point need not detain your lordship in this appeal, as the appellant need only focus on the scope of works according to what Pinebrook's claims in its job claims to the appellant'. Learned counsel for BBSB thus submitted that PHSB undisputed works are cultivation and maintenance of oil palm plants including application of fertilisers, building of roads and bridges, and harvesting and transporting oil palm fruits. According to PHSB the works and services that were to be carried out by it was to cultivate and maintain defendant's (ie BBSB and CSSB) plantation and to harvest and transport oil palm fruits to the oil mills and the plaintiff (ie PHSB) had to engage workers for the contract works. The determination of the exact scope of works and services to be carried out by PHSB, in our view is of extreme importance in determining BBSB counterclaim. This is because BBSB alleged that certain parts of the estate were inaccessible because no roads were constructed. We will say more about this later in the judgment.

[18] PHSB claimed that the instructions for the works that were to be carried out were given by BBSB estate manager and most of the time it came from the managing director of BBSB. The works and services that were rendered were documented in the invoices forwarded to BBSB for payment. These facts are not seriously disputed by BBSB.

[19] In respect of its claim grounded on negligence and breach of duty of care, BBSB had contended that PHSB was appointed not merely as contractor but also as consultant to BBSB; and in respect of its claim that PHSB had made fraudulent payment claims BBSB relied on satellite images (exhs D1, D2, D3 and D4) and its expert witness DW2 Dr Ibrahim Selamat and DW6 Ng See Eng, the land surveyor.

[20] On the evidence, the learned JC found as a matter of fact that PHSB was engaged purely as contractor and also not as consultant. In our view he was right. There is no an iota of evidence to suggest that prior to the termination of PHSB contract in June 2008, payments were made to PHSB as consultant. All payments were made for work done by PHSB as contractor. With regard to the alleged fraudulent claims for work done, BBSB relied on satellite images over the plantation captured by two different programmes ie Spot 5 and Worldview 2 and the evidence of DW2. However having considered these evidences, the learned JC put very minimum value on them. The learned JC found that the satellite images are not reliable and credible. He gave his reasons as follows:

[1] the satellite images (exhs D1, D2, D3 and D4) were allegedly taken by satellites in December, 2008 and May 2010 and two different software

programmes, ie Spot 5 and Worldview 2 and were bought by Dr Ibrahim Bin Selamat (DW2) who is Berkat Bersaudara's expert witness, from Digital Globe, a company in the United States of America.

[2] the authors or makers of the Satellite Images (exhs D1, D2, D3 and D4) were not called as witnesses. Nor was any evidence tendered to show the credibility and reliability of the satellites concerned and the two different software programmes, ie Spot 5 and Worldview 2. There was also no evidence as to whether DW2's computer which was utilised to produce or reproduce the satellite images (exhs D1, D2, D3 and D4) were in good working order.

[3] further Dr Ibrahim Bin Selamat's ('DW2') said at p 56 of the notes of proceedings in answer to question 176 as follows:

> ... After development of Geodatabase the system can generate by its own the information. Meaning to say we do not have to calculate and recalculate again. In respect of the integrity of the data – the data itself has its own integrity. I will show it. It comes with the header information. I believe everybody can go to the site to verify because a picture can tell you more than 1000 works. It never lies unless you modify. In this case, we also have integrity, we have not modified.

> The above testimony of DW2 showed that the integrity of the data can be modified and it is pertinent to note that DW2 is Berkat Bersaudara's expert witness. In the premises, I attach very minimal weight to the Satellite Images (exhs D1, D2, D3 and D4).

[4] since Dr Ibrahim bin Selamat's (DW2) expert testimony is based substantially on the satellite images (exhs D1, D2, D3 and D4) which I attached minimal weight for the reasons given above, I similarly attach minimal weight to DW5's testimony.

[5] as regards the testimony of DW6, which also based substantially on the satellite images (exhs D1, D2, D3 and D4), I also attach minimal or no weight to his testimony.

[21] The above are the learned JC's impression of the evidence that led His Lordship to reach the conclusion as to the facts. In our view His Lordship is entitled to do so. It is trite law that an appellate court is slow to intervene with those conclusion unless it can be shown that the trial court had committed a gross error on the inference or conclusion to be drawn from the evidence adduced. In this case for example the learned JC was entitled to reject the satellite images as conclusive evidence or proof that PHSB had not done the works at all or had not completed the works. The reason for this are twofold. Firstly, the maker of the images were not called and no explanation was offered why he or she could not be called. Secondly, DW2 the expert called by BBSB to interpret the satellite images had testified that the images never lied unless it had been modified. Implied in this testimony by DW2 is that the images can be

modified. There is no independent evidence to show that the satellite images captured by the two above mentioned programmes had not been modified. The only evidence of that is the evidence by DW2. But that could be self-serving because DW2 was BBSB's expert witness. And we note that DW2 was not the person who took the satellite images or having control over the programmes that captured the images. The status of DW2 as an expert witness is also questionable. He had never given evidence in court on similar matter as an expert and there is no evidence that his evidence as an expert on similar matter had been accepted by any court previously. There was also no exchange of expert reports on the satellite images, which were obtained by DW2 from a third party. Also to be noted that PHSB was surprised with the expert witness called by BBSB and objected strongly to it because it was called after PHSB had closed it case.

[22] Learned counsel for BBSB submitted that the learned JC had erred in rejecting or not giving proper judicial appreciation of the satellite images evidence and the oral testimony of DW2 and DW6 on the interpretation of the satellite images. It was further submitted that the learned JC also erred to reject the expert evidence of DW2 on the ground that DW2 was the expert called by BBSB.

[23] Learned counsel for BBSB submitted that the admission of the satellite images as exhs D1, D2, D3 and D4 was never objected to by learned counsel for PHSB; therefore the evidence should not be rejected. It was further submitted that because the satellite images were admitted without any objection there is no requirement to call the maker to testify to its authenticity and the maker presence can be dispensed with. Learned counsel for BBSB relied on the authority of *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 at p 706; [1997] 4 CLJ 509 at p 521 (FC), *Mohd Nazari bin Ab Majit v Tan Keo Hock & Anor* [1998] MLJU 382; [1999] 1 CLJ 601 at p 602.

[24] It was contended by BBSB, and submitted by its learned counsel, that the satellite images as interpreted by DW2 showed that vast plots of land, about 593.57 acres or 63.6% of total area are unplanted or not fully planted with oil palm trees, and yet PHSB had presented job claims on the basis that the blocks are fully planted. It was further contended and submitted that the satellite images showed many blocks in the lands have no roads and yet job claims had been made for planting and maintenance of the alleged oil palm in those blocks.

[25] We note that the learned JC had made a finding that the images were bought by DW2 from a company called Digital Globe which is based in the United States. So the satellite images relied on by BBSB to show that PHSB had

not done the works were not specially commissioned by BBSB for the purpose of verifying the works that had been done by PHSB on the land. More importantly, and as we noted earlier, the satellite were taken by using programmes not within the control of DW2. However the learned JC noted that the satellite images exhs D1–D4 were allegedly taken by satellites in December 2008 and May 2010; and they were taken by using two different software programmes ie Spot 5 and Worldview 2.

[26] Earlier we noted that learned counsel for BBSB submitted that the learned JC rejected the evidence of DW2 because DW2 was the expert called by BBSB. In our view this could be true and it is wrong. However this is not the only ground for the learned JC to reject DW2 evidence of interpretation of the satellite images. On the evidence it appears that DW2 had download the images from his own computer. So the images are computer generated documents. The learned JC therefore put BBSB (and DW2) to task to show that DW2 computer was in good working order to produce or reproduce the satellite images bearing in mind that the origin of the images is probably from another computer program belonging to the company Digital Globe in United States. Section 90A of the Evidence Act 1950 provides that before any computer generated document be received in evidence, it must be shown that the computer that generated the document is in good working order and properly maintained. To this effect s 90A requires that a certificate confirming that fact must be produced and tendered in evidence. There was none in this case. Moreover the learned JC also took into consideration the testimony of DW2 that the Geodatabase system can generate its own information and the data itself has its own integrity unless it is modify. DW2 testified that they (meaning BBSB) had not modified the images. However this is only the evidence by DW2 who gave evidence on behalf of BBSB. There is no independent evidence to verify that the images had not been modified. Learned counsel submitted that PHSB had not called its own expert to verify the satellite images, therefore the argument is PHSB (or the court) cannot now doubted the images. We do not think that is the correct position. We think that the burden is always on the plaintiff (in this case CSSB in the cross-claim) to prove its case. At this point it must be noted that from the notes of proceedings learned counsel for PHSB had agreed to the admission of the satellite images only to its existence; not to its accuracy or truth of the images displayed.

[27] Still on the satellite images, we also note that DW2 in his evidence had not matched the area shown in the satellite images with area on the ground that PHSB claimed to have cleared and planted with oil palm trees; and for which PHSB had submitted claims for payment previously and as well as the claim for April, May and June 2008. In our view it is crucial for BBSB to show that the area shown in the satellite images matches exactly the area on the ground which PHSB had previously made claim for payment and the claim had been paid.

A According to the evidence PHSB had submitted claims in the total sum of RM6,442,972.68 which all had been paid. BBSB contended that out of that total sum paid, an aggregate sum of RM1,1417,821.84 were not justified because they were false claims in that the work stated in the claims submitted for payment cannot have been done as seen by the condition of the estate both B by direct evidence of DW2 and the satellite images. Learned counsel for BBSB further submitted that the evidence of DW6 also supported the evidence by DW2 as well as the images produced by the satellite images.

C **[28]** Learned counsel submitted that the learned JC erred when His Lordship rejected or placed very minimal evidential value on the evidence of DW6. Learned counsel further submitted that DW6 evidence confirmed the condition on the ground as shown in the satellite images. DW6 evidence is that he had used the Global Positioning System ('GPS') together with ground D control point location to determine the location of the estate or land shown in the satellite images and found them to be the same. DW6 further testified that he was able to observe the physical condition of the oil palm estate which was in poor condition. DW6 testified that he and his survey team had to travel 'up and down' the estate to carry out the perimeter survey and that they faced E difficulties to access many blocks.

[29] The learned JC had not attached much weight to the evidence of DW6 because he found that DW6 testimony was based substantially on the satellite images (exhs D1,D2,D3 and D4). What about DW6 testimony that he had F gone to the ground and had observed the physical condition of the estate? This point is not addressed by His Lordship. In our opinion the failure to address this issue is not fatal. The main thrust of DW6 evidence is that he was to confirm that the satellite images of the oil palm estate are indeed the images of the estate belonging to BBSB and CSSB. That is why DW6 had to go to the G ground to do the survey. In other words DW6 was there to do perimeter survey to confirm the location of the estate. At this juncture, it may be recall that BBS has two pieces of land held under PL 086290388 and PL 086290379. These two pieces of lands were divided into two divisions — Division 1 or BB1 and Division 2 or BB2. BB1 measures approximately 672.66 acres (272.77 H hectares) and is divided into seven blocks of approximately 100 acres each. BB2 measures approximately 2306.01 acres (933.230 hectares) and is divided in 23 blocks of approximately 100 acres each.

[30] Clearly therefore that the size of the estate is huge. DW6 did not I identify which part of the estate he had gone to which he alleged was still forested and not planted with oil palm. It is noted that the estates ie BB1 and BB2 comprised of approximately 2978.67 acres. Learned counsel in her written submission submitted that DW2 evidence showed that about 593.57 acres were not planted or not fully planted with oil palm trees. Again DW2 did

not say specifically which block of the estate that had not been fully planted or not planted at all with oil palm trees. Taking the above-mentioned figures a simple arithmetic would suggest that the bulk of the estate had been planted with oil palm. It is also to be noted that at the time the satellite images were taken PHSB had stopped work though there are still areas of the estate yet to be cleared and planted with oil palm. The evidence is that BBSB by a letter dated 4 July 2008 had requested PHSB to temporarily stop work; and by 14 July 2008 PHSB itself decided not to carry on any further work by terminating the contract. The satellite images were taken on 2 December 2008 and 20 May 2010 respectively. Some six months to about two years had lapsed from the date PHSB was requested to stop work and the taking of the satellite images. During this period changes could have taken place on the grounds because the estates were not taken care of.

[31] As for rebuttal of the allegations by BBSB that estate land was not fully planted or not planted at all with oil palm, the witness for PHSB, John Yong, testified that PHSB did plant the oil palm trees in block 10, 12–14, 16 and 21. He also admitted that block 18 and 23 were not planted and PHSB never claimed any money for that two blocks. However he further testified that some of the trees planted could be damaged or destroyed or eaten by wild animals. He testified that Orang Utan could the shoots of palm oil trees in the region of 50–60 trees per day; and wild boars and porcupines can destroyed about 20 trees per night. Learned counsel for BBSB dismissed this rebuttal as poor rebuttal. We do not think so. Considering the estate origin is either virgin or secondary jungle and the time taken to clear the whole approximately 2978 acres of land such explanation does not sound too far fetch or unreasonable.

[32] The learned JC had given his reasons for not attaching too much weight to the satellite images. We agree with those reasons; and in addition we may say that on our above comments and observation of the facts and evidence in this case we also of the view that the satellite images are not conclusive of the evidence that PHSB had not done their work.

[33] This brings us to the claim by BBSB against the other respondents in these appeals for fraud and conspiracy to defraud. The learned JC had found that there is insufficient or no evidence at all to sustain the claim under this two heads. The learned JC noted that BBSB had failed to particularise the particulars of fraud or conspiracy to defraud as required under O 18 r 12(1) of the Rules of the High Court 1980 (now O 18 r 12(1) of the Rules of Court 2012). Learned counsel for BBSB whilst admitting that there is such requirement of the rule for particularisation of the material facts disclosing the fraud and conspiracy submitted that such rule will not apply where there is clear evidence already admitted to the court. We believe the evidence the learned counsel spoke of is the reference to the satellite images. And we have

said that the satellite images were not conclusive. Therefore we think that the learned JC was right to dismiss the claim under this head on the point of pleadings as abundantly explained by this court in *Wong Yew Kwan v Wong Yu Ke & Anor* [2009] 2 MLJ 672 at p 677; [2010] 2 CLJ 702 at p 712 referred by the learned JC in his ground of judgment.

[34] For the above reasons we unanimously dismiss these two appeals with costs. For Appeal No 1739 we award costs of RM20,000 to second and third respondents in the counterclaim and for Appeal No 1740 we award costs of RM10,000 to first respondent in the counterclaim.

Appeals dismissed with costs of RM30,000.

Reported by Dzulqarnain Ab Fatar